ARKANSAS SUPREME COURT

No. CR 05-1077

NOT DESIGNATED FOR PUBLICATION

CHARLES D. SEALE
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered September 21, 2006

APPEAL FROM THE CIRCUIT COURT OF HEMPSTEAD COUNTY, CR 2003-77, HON. DUNCAN MCRAE CULPEPPER, JUDGE

AFFIRMED

PER CURIAM

A jury found appellant Charles D. Seale guilty of rape and sentenced him to thirty years' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the judgment. *Seale v. State*, CACR 04-522 (Ark. App. February 2, 2005). Appellant timely filed in the trial court a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1, which was denied. Appellant now brings this appeal of that order.

Appellant lists as his single point on appeal that the trial court erred in failing to find that counsel was ineffective. His argument is divided into three subpoints. Appellant contends that: (1) trial counsel was ineffective because he refused to allow appellant to testify; (2) trial counsel was ineffective because he refused to allow appellant to accept a plea offer; (3) counsel on appeal was ineffective because he failed to argue error concerning the trial court's response to a question from the jury during deliberation. In its order denying the petition, the trial court found that appellant had

failed to meet his burden of proof on these issues.

In an appeal from a trial court's denial of a petition pursuant to Ark. R. Crim. P. 37.1, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). To prevail on a claim of ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient, with errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and second, the defendant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Noel v. State,* 342 Ark. 35, 26 S.W.3d 123 (2000).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 38, 26 S.W.3d at 125. To rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., that the decision reached would have been different absent the errors. *Id.* Judicial review of counsel's performance must be highly deferential, and a fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*).

Appellant first asserts that trial counsel was ineffective because appellant wished to testify at trial and trial counsel would not allow him to do so. Appellant testified at the hearing on his Rule 37.1 petition that his trial attorney did not allow him to testify and that he communicated his desire to testify to counsel. In addition, appellant presented two experienced attorneys who testified that they believed, had appellant testified, that there was a reasonable possibility or probability that the result in the trial would have been different.

The trial court was not clearly erroneous in finding that appellant had failed to meet his burden of proof as to the first prong of the *Strickland* test. An attorney's advice to a defendant on whether or not to testify and the defendant's decision to take or not take the stand are not grounds for postconviction relief predicated on ineffective assistance of counsel. *Dansby v. State*, 347 Ark. 674, 66 S.W.3d 585 (2002). Appellant contends that trial counsel did not merely recommend that appellant not testify. Appellant contends that he advised counsel that he wished to testify in spite of counsel's recommendation and trial counsel prevented appellant from testifying on his own behalf. Yet, appellant presented no evidence in support of that proposition, other than his own bald assertion of those facts at his Rule 37.1 hearing, without further detail. Although that fact was not specified in its order, the trial court clearly did not find appellant's testimony credible. The judge at a postconviction-relief hearing is not required to believe the testimony of any witness, particularly that of the accused. *Skeels v. State*, 300 Ark. 285, 779 S.W.2d 146 (1989).

Moreover, the trial court, following the close of the State's case and prior to the close of the defense, instructed appellant that it was his absolute right to testify. Upon the court's query, appellant responded that it was correct, as indicated by his attorney, that he did not anticipate testifying. While no witnesses at the hearing on appellant's Rule 37.1 petition may have contradicted

appellant's testimony, the record offers evidence to impeach that testimony. The exchange between appellant and the court is a strong indication that appellant had, at that time, decided to follow his counsel's recommendation.

Appellant next argues that trial counsel did not permit him to accept a plea offer. Once again, appellant asserted that he had communicated his desire to accept the plea offer to trial counsel. Two witnesses, appellant's sister and his brother-in-law, testified that they were present when appellant's attorney advised him of the offer. While both indicated appellant had expressed a desire to take the offer, the testimony does not clearly indicate that either heard appellant instruct his attorney to take the offer. Appellant's sister admitted that she walked away from the discussion between appellant and his attorney before they concluded their conversation. Appellant's brother-in-law was less definite concerning whether he heard the conclusion of the conversation. He did not express any observation, however, that appellant had instructed counsel to accept the offer or that the attorney had indicated he would not carry out those instructions, if given.

Once again, the trial court was not obligated to find the witnesses credible. Even if the court considered them credible, we cannot say that appellant's sister and brother-in-law offered testimony so as to overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The trial court's finding that appellant failed to meet his burden of proof on this point was not clearly erroneous.

Appellant's last argument is that appellate counsel was ineffective because he did not raise a point of error based upon the trial court's response to a question from the jury during deliberation. The jury was returned to open court with a question concerning whether the filing of charges was mandatory for the prosecuting attorney due to the victim's age or whether the charges were filed at

the discretion of the prosecutor. Appellant's attorney commented that he had made a remark in closing that lead to the question. In his closing argument, defense counsel had attacked the victim's credibility and implied that the boy signed a false affidavit. Counsel stated "I'm not unsympathetic with the State's position; you know, you don't pick who walks in your office and signs an affidavit, files a complaint."

The jury had been given an instruction, AMI Crim. 2d 108, on the filing of an information. Over defense counsel's objection, the trial court answered the jury's question, as follows:

> Ladies and gentlemen of the jury, whether mandatory or discretionary in bringing the charge makes no difference in your deliberations and rendering your decisions. The law does give the Prosecuting Attorney the absolute discretion to file or not file an information to bring charges. The filing of an information is not to be considered by you as either guilt or innocence in this matter and you have received the jury instruction to that effect. Follow all of the jury instructions which you have previously been given and which I have read to you and copies of which you have with you in the jury room.

Appellant now argues that it was error for the trial court to give the supplemental instruction in response to the jury's question, contending the supplemental instruction was improper comment on the evidence, and violated Ark. R. Crim. P. 33.7(b)(ii). He asserts that the case would have been reversed on appeal if that argument had been presented. The experienced attorneys who testified indicated that they believed there was a reasonable probability that the argument could have resulted in reversal. One, however, testified that he had not reviewed the transcript, and each qualified his comments. One indicated that he was speculating to some extent, and the other stated that what he meant was that, if he were sitting as an appellate judge, he would have "looked at the point had it been raised."

We cannot say that the trial court was clearly erroneous in finding that appellant had failed to meet his burden of proof on this point. Even were appellate counsel's performance deficient,

appellant has not shown he was prejudiced by the error. Appellant must not only show ineffective assistance of counsel, but must also show that had counsel acted effectively, there was a reasonable probability that the defendant would have been acquitted. *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000). Moreover, counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Appellant has failed to show that the argument would have been successful.

This court has consistently held that it will not reverse in the absence of a demonstration of prejudice. *Diemer v. State*, ___ Ark. ___, ___ S.W.3d ___ (January 26, 2006) (citing *Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003)). Appellant has not shown that appellate counsel would have been able to demonstrate prejudice resulting from the court's comments. Appellant has offered no more than a conclusory statement that the comment was prejudicial.

While he asserts this was an improper comment on the evidence, trial counsel admitted that it was his statement in closing that had led to the jury's question. The trial court was obviously attempting to correct any misleading impression created by that statement in the closing. Closing arguments are not evidence, and the jury had been appropriately so instructed. Considering the trial court's admonishment to follow the instruction regarding the filing of an information, we cannot say that appellant has shown that he was prejudiced by the trial court's comment, that the outcome of the trial would have been different, or that the argument would have been successful on appeal. Because the trial court did not err in finding that appellant failed to meet his burden of proof, we affirm the denial of postconviction relief.

Affirmed.